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TARGET CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GOCLEAR LLC, a California limited
liability company,

Plaintiff,

v.

TARGET CORPORATION, a Minnesota
corporation,

Defendant.

CASE NO. CV 08-02134 MMC

JOINT CASE MANAGEMENT STATEMENT

1 On June 27, 2008, counsel for plaintiff GoClear LLC and counsel for defendant Target
2 Corporation met and conferred pursuant to Federal Rule of Civil Procedure 26(f). The parties
3 now submit this Joint Case Management Statement.

4 **1. Jurisdiction and Service**

5 The Court has subject matter jurisdiction over the asserted federal trademark claims
6 under 28 U.S.C. §§ 1331 (federal question jurisdiction) and 1338 (original and exclusive
7 jurisdiction over trademark actions as well as unfair competition claims joined with a substantial
8 and related claim under the trademark laws), and over the remaining asserted claims under 28
9 U.S.C. §§ 1338(b) and 1367(a) (state law claims arising out of the same operative facts as the
10 federal claims).

11 Neither personal jurisdiction nor venue is disputed.

12 Defendant Target Corporation has been served. There are no parties to this lawsuit
13 remaining to be served.

14 **2. Facts**

15 Plaintiff GoClear asserts that it owns trademark rights to the marks CLEARX and THE
16 CLEAR PRESCRIPTION, which have both been registered by the United States Patent and
17 Trademark Office, for acne preparations. GoClear started using these marks for acne
18 preparations in June 2007, but claims constructive priority in these registered marks as of
19 November 15, 2004 (CLEARX) and December 29, 2004 (THE CLEAR PRESCRIPTION) based
20 on the filing dates of intent to use trademark applications for those marks.

21 Target has used the mark CLEARRX since 2005 in connection with retail pharmacy
22 services offered in Target stores across the country.

23 GoClear claims in its complaint that Target's use of the CLEARRX mark is confusingly
24 similar to its CLEARX and THE CLEAR PRESCRIPTION mark and that Target's use of the
25 CLEARRX mark (which GoClear asserts may be read as "Clear Rx" or "Clear Prescription"
26 among others) constitutes infringement of GoClear's trademark rights and unfair competition
27 under both federal and state law. GoClear seeks injunctive relief to stop Target's use of the
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1 CLEARRX mark as well as monetary relief.

2 In its answer, Target responds that its use of CLEARRX for pharmacy and retail services
3 does not infringe GoClear's rights in the CLEARX mark for acne preparations because there is
4 no likelihood of confusion. Target also filed counterclaims to cancel GoClear's CLEARX and
5 THE CLEAR PRESCRIPTION marks.

6 Target asserts that it owns prior rights to the CLEAR X mark for use in connection with
7 non-medicated skin products, including an acne treatment solution comprising a skin nutritier,
8 toner, moisturizer, anti-oxidant moisturizer, and collagen builder moisturizer. Target asserts that
9 its predecessor in interest has been using the CLEAR X mark for its skin care line, including
10 acne products, since at least as early as February 28, 2004. Target therefore asserts that it has
11 prior use of the CLEAR X mark and has asserted counterclaims to cancel GoClear's CLEARX
12 and THE CLEAR PRESCRIPTION registrations on the basis that they are invalid in light of
13 Target's prior rights in the CLEAR X mark. Target has also asserted a counterclaim to cancel
14 GoClear's registration for THE CLEAR PRESCRIPTION on the grounds that the mark should
15 not have been registered on the Principal Register in the United States Patent and Trademark
16 Office because the mark is merely descriptive.

17 If GoClear's registrations for THE CLEAR PRESCRIPTION and CLEARX are
18 cancelled, it cannot claim constructive priority in these marks as of the November 15, 2004 and
19 December 29, 2004 dates and instead would have to rely for priority on its actual use of the
20 marks beginning in June 2007.

21 **3. Legal Issues**

22 The following legal issues are central to this dispute:

23 (1) Whether GoClear has any valid rights in the CLEARX and THE CLEAR
24 PRESCRIPTION marks that are senior to Target's rights in the CLEARRX mark;

25 (2) Whether Target's use of the CLEARRX mark constitutes trademark infringement
26 and unfair competition;

27 (3) Whether any infringement by Target of the CLEARX and THE CLEAR
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1 PRESCRIPTION marks is willful;

2 (4) Whether GoClear has been damaged by Target's use of the CLEARRX mark;

3 (5) Whether GoClear's THE CLEAR PRESCRIPTION mark is descriptive;

4 (6) Whether GoClear's claims are barred by GoClear's unclean hands;

5 (7) Whether GoClear's trademark registrations for CLEARX and THE CLEAR
6 PRESCRIPTION are invalid and unenforceable;

7 (8) Whether GoClear caused itself any damages that it claims to have suffered;

8 (9) Whether GoClear failed to mitigate any damages it claims to have suffered;

9 (10) Whether GoClear will suffer irreparable harm if Target continues to use the
10 CLEARRX mark for pharmacy services;

11 (11) Whether Target has any valid rights in the CLEAR X mark; and

12 (12) Whether Target's counterclaims are barred by alleged fraud on the patent office,
13 unclean hands, estoppel, or acquiescence.

14 **4. Motions**

15 **GoClear's Statement:**

16 Plaintiff GoClear believes that a motion for summary judgment as to liability or as to
17 Target's counterclaims for declaratory relief may be appropriate after initial discovery. GoClear
18 also believes that a motion for preliminary injunction may be appropriate in this matter.

19 Target intends to request that the case be bifurcated so that one of Target's defenses is
20 tried before GoClear is permitted to seek discovery on its claims and to prove its case. Target
21 purportedly acquired rights to the mark CLEAR X before this litigation was filed, but well after
22 learning of GoClear's trademarks, and contends that its rights in that mark give Target a defense
23 to GoClear's trademark infringement claims. For this reason, Target requests that the Court
24 postpone discovery and trial on GoClear's claims until after Target has been permitted to try its
25 defense. This piecemeal approach to this case is simply inappropriate.

26 The discovery and arguments regarding Target's priority defense are not as clear-cut as
27 Target contends. The CLEAR X mark that Target apparently acquired has not been registered by
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1 the Patent and Trademark Office, so Target faces the burden of proving that its predecessor-in-
2 interest effectively established common law trademark rights dating back more than four years
3 and that those rights have been properly maintained since that time. Thus, Target's priority
4 defense raises issues of when and how the CLEAR X mark was used, where it was used, whether
5 it was ever abandoned, and how the mark was perceived by the public. Depending on the result
6 of discovery, there may or may not be a dispute as to the likelihood of confusion between the
7 CLEAR X mark and GoClear's federally registered trademarks. This, and other disputed issues,
8 may require expert testimony.

9 In addition, Target's defense also raises the issue of the validity of Target's litigation-
10 motivated acquisition of the CLEAR X mark. Discovery regarding this issue may well overlap
11 with discovery Target argues should be postponed until some later date, leaving open the
12 possibility that GoClear will have to depose certain witnesses multiple times.

13 Moreover, Target's entire argument for bifurcation is based on the assumption that it will
14 prevail on its priority defense. GoClear obviously disputes this and expects that the defense will
15 ultimately fail. Under Target's proposal, however, plaintiff GoClear would be prevented from
16 beginning discovery on its affirmative claims until after defeating Target's defense sometime in
17 early 2009. Target has not offered a schedule for the second phase of its proposed bifurcated
18 lawsuit, but GoClear's day in court would surely be postponed by many months under Target's
19 proposal. Further, Target's challenge to GoClear's priority is a jury issue in light of GoClear's
20 prayer for damages at law, and GoClear is not willing to waive its right to a jury. Thus,
21 bifurcation would also raise the prospect of conducting two different jury trials involving many
22 of the same witnesses and facts.

23 For all of these reasons, Target's proposal should be rejected. If the Court is considering
24 bifurcation, however, GoClear requests that it be permitted to submit separate briefing on this
25 issue. A case management statement is not the place for the extended legal argument that this
26 issue would require.

1 Target's Statement:

2 Target proposes bifurcating the case to first address the issue of priority—which, if
3 decided in Target's favor, would resolve all claims in the case—before moving on to the
4 remaining discovery- and testimony-intensive issues. GoClear argues that Target is attempting
5 to try one of its defenses prior to GoClear's claims. This is simply not the case. As the plaintiff,
6 GoClear must establish both that it is the owner of valid prior rights *and* that Target is infringing
7 those rights. If GoClear cannot establish valid *prior* rights, then the Court need not consider the
8 issue of infringement. This is not merely Target's defense, it is an element of GoClear's
9 infringement case. Thus, priority is a simple and case dispositive threshold issue: if GoClear
10 cannot rely on the filing dates for its registrations as its constructive first use dates, GoClear does
11 not have any claim against Target. GoClear does not and cannot dispute this.

12 Target believes that GoClear will not be able to rely on its constructive first use dates
13 because (1) Target has rights in the CLEAR X mark that are prior to GoClear's constructive use
14 dates for CLEARX and THE CLEAR PRESCRIPTION, marks which GoClear cannot dispute
15 are confusingly similar to CLEAR X, rendering those registrations invalid and unenforceable,
16 and (2) the THE CLEAR PRESCRIPTION mark is descriptive and therefore should not have
17 been registered on the Principal Register, rendering its registration invalid and unenforceable. If
18 GoClear cannot rely on its filing dates for its two registrations, the Court will not need to reach
19 the issues of likelihood of confusion, Target's intent, and damages.

20 In addition to being case dispositive, priority is a relatively narrow issue with limited
21 discovery that could be tried without a jury. Here, GoClear relies on the filing date of its
22 applications to assert priority in the CLEARX and THE CLEAR PRESCRIPTION marks while
23 Target relies on its predecessor's use of the CLEAR X mark. Given the circumstances of this
24 case, discovery into the priority issue would be fairly limited. Fact discovery would likely be
25 limited to Target's predecessor-in-interest's use of the CLEAR X mark and neither party would
26 be likely to rely on expert testimony or conduct time-consuming and expensive surveys on the
27 priority issue alone. Moreover, there would be no overlap between the discovery on the priority
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1 issues and discovery on the remaining issues, and no risk of multiple depositions of individual
2 witnesses. Target's predecessor-in-interest is knowledgeable about the priority issues, while
3 Target employees are knowledgeable about the infringement, willfulness, and damages issues.
4 There is no overlap between them.

5 In contrast, both parties would need to do extensive discovery on the remaining issues in
6 the case, including discovery of facts relevant to the eight-factor *Sleekcraft* test that is central to
7 any determination of infringement, GoClear's willfulness allegations, GoClear's claim that it is
8 being irreparably harmed, and GoClear's damages claim. This discovery will likely require
9 multiple depositions of various fact witnesses. Further, both parties would likely want to engage
10 experts to conduct surveys (which usually require at least 45 to 60 days to plan and execute and
11 which cost hundreds of thousands of dollars) on the issue of likelihood of confusion.

12 Contrary to GoClear's assertions, both parties are likely to save significant time and
13 expense by addressing the issue of priority before undertaking discovery on the remaining issues
14 in the case. Moreover, because Target plans to move for summary judgment on the issue of
15 priority once discovery is completed on that issue, bifurcating the issues will likely result in a
16 significantly faster resolution of the entire case.

17 Target proposed bifurcation of the case at the Rule 26(f) conference, but GoClear did not
18 agree. If the Court does not feel adequately briefed to resolve this issue at this point, Target
19 would like to submit to the Court a separate motion to bifurcate the case.

20 **5. Amendment to Pleadings**

21 The parties do not currently contemplate the amendment of pleadings for any reason,
22 including to add new parties. The parties propose that the Court set a deadline of September 26,
23 2008 for the parties to amend pleadings.

24 **6. Evidence Preservation**

25 Each party represents that it has taken steps to preserve evidence, including electronic
26 evidence, relevant to the issues reasonably evident in this action.

1 **7. Disclosures**

2 The parties exchanged initial Federal Rule of Civil Procedure 26(a)(1) disclosures on
3 August 1, 2008.

4 **8. Discovery**

5 The parties will seek discovery on the factual and legal issues discussed above. To date,
6 no discovery has been taken in this case. Certain discovery was exchanged by related parties,
7 however, in a prior proceeding before the Trademark Trial and Appeal Board of the U.S. Patent
8 and Trademark Office. The parties have agreed to list documents that were produced in that
9 prior administrative proceeding in their initial disclosures in this case. Although the parties have
10 agreed to a date to produce documents identified in their initial disclosures, the parties have
11 agreed that they do not need to include the documents previously produced in that prior
12 administrative proceeding in their production in this case. The documents will be treated as if
13 they were produced in this case.

14 The parties do not believe that any modification to the discovery rules and procedures in
15 the Court's Local Rules and the Federal Rules of Civil Procedure are necessary.

16 Pursuant to Federal Rule of Civil Procedure 26(f)(3), the parties agree that they will
17 produce electronically stored information in TIFF format, rendered text searchable to the extent
18 feasible through optical character recognition (OCR) or similar means, but reserve the right to
19 seek production of files in native format if reasonably necessary.

20 Discovery and disclosure deadlines are addressed in Section 17 below.

21 **9. Class Actions**

22 This case is not a class action.

23 **10. Related Cases**

24 There are no related cases pending in federal or state court, although the parties note that
25 the following administrative proceeding is currently pending before the Trademark Trial and
26 Appeal Board of the U.S. Patent and Trademark Office: *Target Brands, Inc. v. Alan Russ*
27 *Gottlieb*, Petition for Cancellation No. 92049255 filed on April 22, 2008. The parties have
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1 stipulated to suspend this cancellation proceeding pending the resolution of the instant case.

2 **11. Relief**

3 Plaintiff GoClear seeks preliminary and permanent injunctive relief to prevent Target
4 from offering products or services under the CLEARRX mark and any marks confusingly similar
5 to CLEARX or THE CLEAR PRESCRIPTION, treble damages, costs, and attorneys fees.

6 Defendant Target seeks the cancellation of GoClear's federal registrations for CLEARX
7 and THE CLEAR PRESCRIPTION.

8 **12. Settlement and ADR**

9 The parties agree that private mediation may be appropriate in this matter after certain
10 initial discovery has been completed.

11 **13. Consent to Magistrate Judge for All Purposes**

12 The parties do not consent to have a magistrate judge conduct all further proceedings,
13 including trial and entry of judgment.

14 **14. Other References**

15 The parties do not believe that this case is suitable for reference to binding arbitration, a
16 special master, or the Judicial Panel on Multidistrict Litigation.

17 **15. Narrowing of Issues**

18 The parties are not presently aware of any issues that can be narrowed by agreement.

19 **16. Expedited Schedule**

20 **GoClear's Statement:**

21 Plaintiff GoClear believes that this case can be handled consistent with the schedule it
22 proposes below in Section 17. GoClear also believes, however, that this case is appropriate for
23 handling on a more expedited basis with streamlined procedures. The factual and legal issues are
24 relatively narrow and a certain amount of relevant material has already been exchanged in
25 discovery in pending proceedings before the U.S. Patent and Trademark Office. Target's
26 proposal to bifurcate this lawsuit, on the other hand, would likely extend the overall duration of
27 this litigation and increase the overall cost.

1 GoClear's proposed schedule would get this case to trial in just over thirteen months from
2 the date the complaint was served on Target. This is an appropriate amount of time for a case of
3 this size and complexity, particularly where relevant discovery has been exchanged in a prior
4 proceeding. GoClear's proposed schedule would provide more than five months (from the date
5 of the Rule 26(f) conference) for fact discovery and nearly three more months to provide expert
6 reports and conduct expert discovery. Despite Target's arguments to the contrary, GoClear has
7 attempted to modify its proposed schedule to address issues raised by Target, but it has done so
8 while also attempting to preserve a schedule that will bring this matter expeditiously to trial
9 without unnecessary, and expensive, delay.

10 Target's Statement:

11 During the Rule 26(f) conference Target proposed bifurcating the case so that the parties
12 focus on the issue of priority before they move forward with discovery on the remaining issues in
13 the case. Target believes that the issue of priority should be addressed in this case before any
14 other issues, because it is a simple and case dispositive issue: If GoClear fails to establish that it
15 has prior rights in the CLEARX and THE CLEAR PRESCRIPTION marks, the Court need not
16 consider the remaining issues in the case. In addition to being case dispositive, priority is a
17 relatively narrow issue with limited discovery that likely will not involve expert testimony or
18 time-consuming and expensive surveys. By focusing on the issue of priority before discovery is
19 permitted on the remaining issues in the case, both parties will save significant time and expense.
20 Moreover, because Target plans to move for summary judgment on the issue of priority once
21 discovery is completed on that issue, bifurcating the issues will likely result in a significantly
22 faster resolution of the entire case.

23 Even if the case is not bifurcated, GoClear's proposed schedule is unreasonable and
24 untenable and Target cannot agree to it. Target has expressed its concerns to GoClear, but
25 GoClear has not been willing to modify the schedule sufficiently to address Target's concerns.

26 GoClear initially proposed a January 16, 2009 deadline to complete both fact and expert
27 discovery, with the deadlines to exchange expert reports (opening and rebuttal) falling within a
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1 three-week period in December, prior to the close of fact discovery. When Target objected to
2 any exchange of expert reports prior to the close of fact discovery, and to GoClear's proposed
3 *three-week* period to exchange rebuttal expert reports, GoClear made minor adjustments to its
4 schedule—by *shortening* its initially proposed discovery cutoff by six weeks, and then allowing
5 two additional weeks to prepare rebuttal expert reports.

6 GoClear's schedule, however, still does not allow sufficient time for expert discovery,
7 which in a trademark matter is by definition time-intensive. For example, the completion of a
8 reliable survey usually takes somewhere between 45 and 60 days to execute. GoClear's schedule
9 allows only five weeks (over the end-of-the-year holidays) for experts to prepare their opening
10 reports and only five weeks for experts to prepare their rebuttal reports. This is simply not
11 enough time if either party intends to submit survey evidence through its expert. Moreover,
12 GoClear's shortened period for fact discovery—a period of approximately three months from the
13 Case Management Conference—does not allow ample time for the parties to take discovery on
14 the numerous issues in GoClear's case and in Target's three counterclaims.

15 Target has also repeatedly expressed its concerns that GoClear's proposal allowing only
16 two weeks for the close of expert discovery after rebuttal reports are exchanged and only ten
17 days to prepare and file dispositive motions after the close of expert discovery is too compressed.
18 Target has told GoClear that it believes a reasonable schedule is to allow four weeks for the close
19 of expert discovery after rebuttal reports are exchanged and four weeks to prepare and file
20 dispositive motions after the close of expert discovery. GoClear has refused to adjust its
21 schedule to accommodate Target's concerns, and has provided no justification for its schedule.

22 Because GoClear has refused to adjust its schedule sufficiently to address Target's
23 concerns, particularly on the timing of the fact discovery cutoff, expert disclosures, expert
24 discovery cutoff, and the last day to file dispositive motions, Target is submitting its own
25 proposed schedule for a non-bifurcated case, working from the January 16, 2009 discovery
26 cutoff that GoClear initially proposed. Target is also submitting a proposed schedule for a
27 bifurcated case, which anticipates a trial on the issue of priority in early February 2009.

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17. Scheduling**GoClear's Proposed Case Schedule:**

Deadline to exchange Rule 26(a)(1) disclosures:	August 1, 2008
Deadline to produce documents under Rule 26(a)(1):	September 15, 2008
Deadline to amend pleadings:	September 26, 2008
Close of fact discovery:	December 5, 2008
First expert witness disclosure and reports (any expert who will testify on an issue on which the party bears the burden of proof to be disclosed by that party, along with all information required by Fed. R. Civ. Proc. 26):	January 9, 2009
Second expert witness disclosure and reports (parties shall disclose any rebuttal experts to experts disclosed by opposing party, along with all information required by Fed. R. Civ. Proc. 26):	February 13, 2009
Close of expert discovery:	February 27, 2009
Deadline to file dispositive motions:	March 6, 2009
Pretrial conference:	May 12, 2009
Trial:	May 25, 2009

Target's Proposed Bifurcated Case Schedule with Priority Being Heard First:

Deadline to exchange Rule 26(a)(1) disclosures:	August 1, 2008
Deadline to produce priority-related documents under Rule 26(a)(1):	September 12, 2008
Deadline to amend pleadings:	September 26, 2008
Close of fact discovery on priority:	October 30, 2008
Deadline to file dispositive motions on priority:	November 14, 2008
Pretrial conference:	January 16, 2009
Trial on priority:	February 2, 2009

Target's Proposed Case Schedule without Bifurcation:

Deadline to exchange Rule 26(a)(1) disclosures:	August 1, 2008
Deadline to produce documents under Rule 26(a)(1):	September 26, 2008
Deadline to amend pleadings:	September 26, 2008
Close of fact discovery:	January 16, 2009
First expert witness disclosure and reports (any expert who will testify on an issue on which the party bears the burden of proof to be disclosed by that party, along with all information required by Fed. R. Civ. Proc. 26):	February 27, 2009
Second expert witness disclosure and reports (parties shall disclose any rebuttal experts to experts disclosed by opposing party, along with all information required by Fed. R. Civ. Proc. 26):	April 30, 2009
Close of expert discovery:	June 1, 2009
Deadline to file dispositive motions:	June 30, 2009
Pretrial conference:	September 11, 2009
Trial:	September 28, 2009

18. Trial

The parties agree that if the case is not bifurcated, it will be tried to a jury and it will last six court days.

Target expects that if the case is bifurcated, the trial on priority will be tried to the Court and will last two court days. Target notes that GoClear indicates above that it is entitled to a jury trial on the issue of priority because its complaint includes a damages claim. Although Target believes that this is not correct, the issue can be included in any separate briefing that the Court allows on the bifurcation issue.

19. Disclosure of Non-Party Interested Entities and Persons

All parties have filed the "Certificate of Interested Entities or Persons" required by Civil Local Rule 3-16. As set forth in its Certification, plaintiff GoClear identifies the following listed persons, associations of persons, firms, partnerships, corporations (including parent corporations), or other entities that (i) have a financial interest in the subject matter in

controversy or in a party to the proceeding, or (ii) have a non-financial interest in that subject matter or in a party that could be substantially affected by the outcome of this proceeding:
 Alan R Gottlieb, MD, the managing member of GoClear LLC.

As set forth in its Certification, Target identifies the following listed persons, associations of persons, firms, partnerships, corporations (including parent corporations), or other entities that (i) have a financial interest in the subject matter in controversy or in a party to the proceeding, or (ii) have a non-financial interest in that subject matter or in a party that could be substantially affected by the outcome of this proceeding: Target Brands, Inc., a wholly owned subsidiary of Target, is the owner of the CLEARRX and CLEAR X trademarks, and pending trademark applications, and licenses use of those marks to Target.

20. Other Issues

The parties do not currently have other issues to identify regarding case management.

Dated: August 22, 2008

LATHAM & WATKINS LLP

By: /s/
 James L. Day
 Attorneys for Plaintiff
 GOCLEAR LLC

Dated: August 22, 2008

MORRISON & FOERSTER LLP

By: /s/
 Jennifer Lee Taylor
 Attorneys for Defendant
 TARGET CORPORATION

I attest that concurrence in the filing of this document has been obtained from Jennifer Lee Taylor.

By: /s/
 James L. Day of Latham & Watkins LLP
 Attorneys for Plaintiff
 GOCLEAR LLC